SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 72-1633

COLUMBIA BROADCASTING SYSTEM, INC., CALVADA PRODUCTIONS, A JOINT VENTURE, JACK CHERTOK TELEVISION, INC., AND DENA PICTURES, INCORPORATED,
Petitioners,

v.

TELEPROMPTER CORPORATION AND CONLEY ELECTRONICS CORPORATION,
Respondents.

On Certiorari to the United States Court of Appeals For the Second Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	PAGE
STATEMENT	1
ARGUMENT	4
I. The *Fortnightly* Test Requires an Analysis in Terms of the Totality of a Cable Television Station's Functions	4
A. Origination	7
B. Interconnection	9
C. Sale of Commercials	10
D. The Broadband Assertions	11
II. FCC Regulation Is Irrelevant to the Issues Herein	13
III. "Network" Regulation Is Cable Television's Self-Created Hobgoblin	15
CONCLUSION	16

TABLE OF AUTHORITIES

CASES:

Associated Music Publishers Inc. v. *Debs Memorial Radio Fund*, 141 F. 2d 852 (2d Cir.), *cert. denied*, 323 U. S. 766 (1944)	10
Fortnightly Corp. v. *United Artists Television, Inc.*, 392 U. S. 390 (1968)	*passim*
Herbert v. *Shanley Co.*, 242 U. S. 591 (1917)	10

OTHER SOURCES:

Cable Television Report and Order, 36 FCC 2d 143 (1972)	14
Memorandum for the United States as *Amicus Curiae* in *Fortnightly Corp.* v. *United Artists Television, Inc.*, January 1968	3
S. 1361, 93rd Cong., 1st Sess. (1973)	3
Second Further Notice of Proposed Rulemaking in Dkt. No. 18397-A, 24 FCC 2d 580 (1970)	10
TV Guide, Nov. 17, 1973	13

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COLUMBIA BROADCASTING SYSTEM, INC., CALVADA PRODUCTIONS, a joint venture, JACK CHERTOK TELEVISION, INC., and DENA PICTURES, INCORPORATED,

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—against—

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REPLY BRIEF FOR PETITIONERS

Statement

In the main brief in this docket,[1] Cross-Petitioners Columbia Broadcasting System, Inc., Calvada Productions,

[1]References to Brief for Petitioners in this Docket No. 72-1633 will be to "Cross-Pet. Br." References to Teleprompter's answering brief in this docket will be to "TPT Br." References to Teleprompter's main brief in Docket No. 72-1628 will be to "TPT Pet. Br." and references to the answering brief of Cross-Petitioners herein in Docket No. 72-1628 will be to "Cross-Pet. Resp. Br." References to the brief *amicus* filed by the Motion Picture Association of America, Inc., *et al.*, in Docket No. 72-1628 will be to "MPAA Br."

Jack Chertok Television, Inc., and Dena Pictures, Incorporated noted that the Teleprompter cable stations, in addition to selecting, procuring, and importing distant signals (contrary to the specific intent of copyright owners) also originated substantial television programming, sold commercials, and interconnected to form networks—just like broadcasters. Cross-Pet. Br. 9-13.

These functions were not performed by the CATV systems in *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U. S. 390 (1968). It is the performance of these entirely new functions which puts Teleprompter, in its own words, in direct "competition" with "broadcast television" stations and with "advertising agencies, talent agencies and television broadcasting networks" for program material, sponsors, and audience (E-11). See appendix references at Cross-Pet. Br. 22.

This case involves in part a construction of what this Court meant in *Fortnightly*. For that reason, it is important to note what the issues there were as the cable interests articulated them. The cable interests strongly urged the courts in *Fortnightly* to limit their decisions to the "particular facts" of the "particular systems" there at issue. In that case the Fortnightly systems did absolutely nothing but *enhance* the reception of signals which were in the air over the CATV communities and which could, in fact, be received in the communities by rooftop and tower-mounted antennas. Cross-Pet. Br. 15; Cross-Pet. Resp. Br. 27-28. The courts were told by Fortnightly counsel (presumably because he believed it made a difference) that program origination, importation of distant signals by microwave, and the sale of commercials were definitely *not* involved in that case and as a result should be disregarded. Cross-Pet. Br. 8, 16; Cross-Pet. Resp. Br. 31-32.

Having narrowly won a victory in *Fortnightly* by urging the courts there not to consider the functions which are

involved in this case, Teleprompter counsel, Fortnightly counsel in 1968, now attempts to reverse the strategy which was so successful in 1968. Now the cable interests urge that *none* of these new functions, which they successfully kept out of the case in 1968, really have any significance and that *Fortnightly* gave a copyright immunity to the entire cable television industry no matter what functions cable television stations perform.[2] Yet once again, the Court is told that it must limit itself to specific facts occurring at the specific dates set out in the complaints. *E.g.*, TPT Br. 3, 21.

This strategy is, of course, incongruous with the fact that the parties below tried this case as a test case designed to relieve the courts of repeated decisions on these cable-copyright issues. But now Teleprompter suggests that there be a postponement in the resolution of some issues as there might be need for a "new court proceeding" to consider certain new developments. TPT Br. 25.

Cross-Petitioners respectfully submit that the time has come for a judicial construction of the Copyright Act of 1909 as a self-contained statute with respect to these cable television stations.

Notwithstanding, what might have been hoped for or perhaps expected by this Court when it decided *Fortnightly*, 392 U. S. at nn. 17 and 33, there has been no legislative resolution of the issues. The currently pending legislation (S. 1361, 93rd Cong., 1st Sess. (1973)) like almost all of its predecessor proposals, if enacted, would impose copyright liability on all cable stations retransmitting broadcast signals, whether local or distant. As appears, however, to those who have participated in the negotiations with respect

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[2]Sometimes the argument is phrased as a "dedicated to the public" concept—a concept which has been rejected by a long line of authority, Cross-Pet. Resp. Br. 64, as the Solicitor General advised this Court in 1968. Memorandum for the United States as *Amicus Curiae* in *Fortnightly Corp.* v. *United Artists Television, Inc.*, filed January 1968, at 9.

to the proposed legislation, the cable television industry is only interested in legislation when the latest judicial copyright decision is unfavorable to it. See MPAA Br. 55-61. A reversal of the Court of Appeals in the manner urged by Teleprompter thus might doom the hope for any cable-copyright legislation. However this might be, Cross-Petitioners submit that the power to declare the Copyright Act inoperative for an entire industry resides in the Congress, not the courts.

Argument

Relying as it did in its brief in Docket No. 72-1633 on irrelevant Federal Communications Commission ("FCC") policy statements and regulation and hypothetical anti-cable conspiracies, Teleprompter attempts to avoid this Court's functional analysis as set out in *Fortnightly*. As shown in Cross-Petitioners' main brief in this docket, cable television stations which, like the Teleprompter stations here at issue, are functionally equivalent to "broadcasters" are not "viewers," are not "passive beneficiaries," and are not "on the viewer's side of the line." Rather, under *Fortnightly* they must be treated as "broadcasters" for copyright purposes. Cross-Pet. Br. 7, 15-19.

I

THE *FORTNIGHTLY* TEST REQUIRES AN ANALYSIS IN TERMS OF THE TOTALITY OF A CABLE TELEVISION STATION'S FUNCTIONS.

By having demanded separate briefing of the two dockets now before this Court, Teleprompter sought to create an artificial separation of the importation functions performed by the Teleprompter cable television stations[3] and the func-

[3]This issue was separately briefed by the parties in Docket No. 72-1633.

tions involved in this docket. Alleged separation of functions is stressed throughout the Teleprompter brief in this docket.

It is eminently clear, however, that the various functions performed by the Teleprompter cable television stations are not separate for purposes of Teleprompter's planning, advertising, promotion, and sales techniques, but rather only for purposes of "legal argumentation" in this Court. See Cross-Pet. Br. 29-31. That this is the case is clearly admitted by Teleprompter in its brief herein, where it says that "program origination provided an ancillary service to attract subscribers to the reception service." TPT Br. 28. The fact is that no one of the services offered by the cable television stations herein could be bought separately from any other. This fact was noted by both courts below. Cross-Pet. Br. 6, 29.

It is apparent, as we pointed out in our main brief, that each of the Teleprompter functions feeds off the others. Teleprompter heavily advertises its "exclusive" importation of distant signals, Cross-Pet. Resp. Br. 40, and its "exclusive" interconnection for special programming. See Cross-Pet. Br. 29-30. This attracted subscribers to the system, who in turn may choose to watch Teleprompter's own originations. Obviously, this helps Teleprompter in selling commercials. It makes no difference that these other services are performed by Teleprompter's stations on separate channels. The nature of the business performed by the entities in question and the function they play in "the total process of television broadcasting and reception" is unchanged by the number of channels employed.

While Cross-Petitioners are berated for emphasizing the totality of functions performed, TPT Br. 21-31, we do no more than take the *Fortnightly* decision as we find it. That decision said that copyright liability depended upon a determination of the function that cable systems perform.

A proper understanding then of the Court's liability-determining standards, such as "viewer," "viewer's side of the line," "active performer," and "passive beneficiary," in terms of the "total process of television broadcasting and reception," surely compels one inevitably to look to the *totality* of the functions performed by the cable television stations involved in this case. See Cross-Pet. Br. 7, 16-19, 23, 31-32. If that concept had been properly applied below, the Court of Appeals should have decided the issues in this docket favorably to Cross-Petitioners.

While Teleprompter is not a "broadcaster" by technical FCC definition, it is not a "viewer" by any stretch of common sense or even imagination. There is no analogy which can be drawn between the Teleprompter cable stations and the primitive Fortnightly reception-aiding devices. The only proper functional analogy is that between a Teleprompter cable television station and a network affiliated broadcast television station, whether the latter imports the network signals from distant or from local sources.

For example, a television network broadcast affiliated station outside of New York City (i) imports *distant* signals from the network, (ii) originates programming, (iii) sells commercials,[4] and (iv) interconnect to form networks. At the same time, station WCBS-TV, a CBS owned and operated station in New York City, retransmits to its audience "local signals" from the CBS Television Network broadcasting center in New York and also performs the other functions of a "broadcaster." Both of these affiliates perform the "broadcasting" functions noted above and mentioned by this Court in *Fortnightly*. 392 U. S. at 397-400. These "broadcasting" functions are the

[4]Educational television stations are classified as "broadcasters" and subject to the Copyright Act even though they do not sell commercials.

essential and characteristic functions of the cable television stations herein as well as of network television affiliates.

"Viewers" do not perform any of these functions, either singly or in combination. Under the *Fortnightly* tests, entities which are functionally equivalent—and admittedly competitive—must be treated equally for copyright purposes. "Broadcasters" and those functionally equivalent to "broadcasters," including Teleprompter cable television stations, must then remain liable under the Copyright Act for all programming transmitted and retransmitted by them. Any exception to this principle would run contrary to the purpose of the Copyright Act and would produce a discrimination not justified by fact or logic.

A. Origination

To minimize the importance of its origination activities, Teleprompter argues that it devotes more time and effort to appropriating Cross-Petitioners' copyrighted works without payment of royalties than it does to originating its own programming. TPT Br. 9-11. This is a confession that Teleprompter is living off the backs of copyright proprietors.

In any event, Teleprompter plays a meaningless numbers game. In contrast, Cross-Petitioners specifically excluded from their origination calculations presented at trial, in the interests of conservatism, the huge number of hours Teleprompter devotes to programs such as time, weather, and other similar related originations (A. 458a-459a); had we not done so, the hours of origination by Teleprompter cable television stations would have shot up enormously.[8] Further, a network affiliated broadcaster also devotes more

[8]Teleprompter in New York City now advertises that it offers "3,000 hours a month of exclusive programming and program services." Cross-Pet. Br. 10 n. 13. That is over four times as many hours as any television station could possibly originate or retransmit with only 720 hours in an average month.

time to importing the signals of its network than it does to its own originations; yet it remains functionally a "broadcaster" for copyright purposes, just like Teleprompter.

As mentioned above, in order to further obfuscate the impact of its origination activities on its total integrated service, Teleprompter makes the separate channel argument. TPT Br. 21, 28. As was shown in our main brief in this docket, this argument is wholly irrelevant. Cross-Pet. Br. 31-33.

In the last analysis, the Teleprompter experience is contrary to the *Fortnightly* concept that a limited copyright immunity is justified for retransmission of local signals where a CATV system does no more than merely *enhance* the reception of the television signals already in the area. 392 U. S. at 399. Teleprompter's New York cable television station, a good example of an originating cable station which does not presently import distant signals, uses the numerous separate channels available to it for its own regular program originations and various other programming services in addition to broadcast signal retransmissions. See Cross-Pet. Br. 10. Teleprompter subscribers hooked up to the Teleprompter station, however, can view only one channel at a time, a highly significant fact for copyright purposes.

Teleprompter retransmits the signals of WCBS-TV and other broadcast stations in New York and advertises this fact to attract audience for Teleprompter's own programming and commercials on other of its station's channels. Those WCBS-TV signals were intended to be received in New York City. But if a Teleprompter paying subscriber watches one of the numerous Teleprompter origination channels, he cannot view the signals of the local New York television stations, including WCBS-TV. Far from enhancing the reception of the local broadcast television

signals, Teleprompter's origination activities thus may actually lessen such viewing.[6] However desirable these non-reception activities may be, Teleprompter in originating popular sporting events, such as New York Ranger hockey games, effectively blocks out WCBS-TV just as surely as if it had placed its own programming on Channel 2 in lieu of CBS programming.

As a result of having the local broadcasters' audience fractionalized in this way by Teleprompter Manhattan's origination activities, WCBS-TV and the other local New York television stations attract smaller audiences. In turn, the copyright holders of programs licensed to such stations will be able to bargain only for fees smaller than those which would otherwise be available.[7]

However many channels a Teleprompter cable television station uses, though, origination of programming is a function of a "broadcaster," not of a television "viewer." Under the functional analysis required by *Fortnightly*, a Teleprompter cable television station which originates programming should thus be treated as a "broadcaster" for copyright purposes, not as a "viewer."[8]

B. Interconnection.

Teleprompter concedes that interconnection is a function of significance, but alleges that it interconnected only

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[6]This is a type of competition which would be desirable if Teleprompter cable television stations paid copyright royalties for the programs they retransmit, as their competitors the broadcasting network affiliated stations do.

[7]A complete record on the injury and potential injury resulting from Teleprompter's activities was not developed because the District Court improperly refused to admit most of the evidence in this connection as irrelevant (A. 311a, 314a, 422a-423a, 436a-437a, 444a-445a).

[8]As pointed out in our main brief in this docket, at nn. 25 and 29, both the FCC and this Court already consider originating cable television stations as broadcasters for other purposes.

with respect to its own programming. TPT Br. 13-14, 24-25. In the first place, this is not completely true as Teleprompter's Manhattan station was relaying broadcast television signals to another cable television station in the Bronx (A. 507a). In any event, this is nothing but a repetition of the irrelevant separate channel argument.

As with origination, interconnection dilutes the audience for broadcast programming. Since only one channel can be viewed at a time, any particular broadcast signal may be effectively blacked-out, notwithstanding the fact that it was intended to be received in the community within the meaning of *Fortnightly*.

Interconnection is a "function" of a "broadcaster" and, under this Court's *Fortnightly* test, it is immaterial that the interconnection occurs with respect to material originated on a channel other than that used for the retransmission of the misappropriated programming. In interconnecting, Teleprompter is performing the same function as a broadcast television network affiliated station.

C. Sale of Commercials

Teleprompter does not deny that sale of commercials is a function of a "broadcaster" as described by this Court in *Fortnightly*. It argues rather that evidence was introduced only with respect to a few examples of such sale. TPT Br. 15. This argument, though, is surely disingenuous.[9] Indeed, it was perhaps with this judicial proceeding in mind that Teleprompter for years instructed various of its station managers *not* to sell commercials (A. 538a-539a, 554a-555a). None of the trial witnesses for Teleprompter, including its Chief Executive Officer,

[9]In order to save time, there was no pretrial discovery in this case—no depositions, no interrogatories, no full scale document production. In a test case, it is not necessary to multiply the illustrative examples presented to the Court.

was able to explain why this peculiar and uneconomic "policy" was adopted (A. 576a-577a, 605a-607a). Indeed, once the trial of this action was concluded, Teleprompter greatly increased its sale of commercials at least in New York City. Cross-Pet. Br. 10-11, 26.[10]

Sale of commercials is, of course, an undeniable function of a "broadcaster." 392 U. S. at 400 n. 28. Teleprompter is now heavily involved in such sales and in such involvement it is functioning precisely as a "broadcaster," not as a "viewer."

D. The Broadband Assertions.

Teleprompter strongly objects to being classified in this case as a "broadband communications company" rather than as a simple community antenna television reception service. Cross-Petitioners, however, did not coin that phrase. Before his fall from grace, Irving Kahn was Teleprompter's chief spokesman and, indeed, a spokesman for the entire cable television industry. He recognized that the function of the cable industry was rapidly changing and he said so as explicitly and on as many occasions as possible when

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[10]Again Teleprompter at p. 24 of its brief in this docket urges the separate channel argument. In the past, however, the courts have made it clear that the carriage of advertising by a radio station on certain programs *does* affect the copyright liability of the station for programs without commercial content and subjects *all* of the station's performances to liability under the Copyright Act. *Associated Music Publishers, Inc.* v. *Debs Memorial Radio Fund, Inc.*, 141 F. 2d 852 (2d Cir.), *cert. denied*, 323 U. S. 766 (1944). See also *Herbert* v. *Shanley*, 242 U. S. 591 (1917). See Cross-Pet. Br. 32-33.

Teleprompter also argues at p. 20 n. 22 that cable television stations are currently prohibited by FCC rule from substituting their own commercials for those commercials found in the broadcast programming they retransmit. The FCC regulation forbidding such substitution may change at some future time; indeed, the FCC at one time contemplated permitting cable television deletion and substitution of commercials. See *Second Further Notice of Proposed Rulemaking* in Dkt. No. 18397-A, 24 FCC 2d 580, 582 (1970).

it served Teleprompter's economic interests for him to do so. Cross-Pet. Br. 20-21.[11]

The problem is not, as Teleprompter would have this Court believe, the extent to which Mr. Kahn's statements might be termed "public relations words and catchy imagery." TPT Br. 17. The fact is that Mr. Kahn's pretrial admissions with respect to the new functions of the new cable television industry cannot be squared with the functions performed by an entity on the "viewer's side of the line" as set forth by this Court's *Fortnightly* analysis. The new and aggressive cable television industry so vividly described by Mr. Kahn before trial is just not entitled to the copyright immunity granted the passive beneficiaries before the Court in *Fortnightly*.

Cable television station operators, such as Teleprompter, now use the revenues they save by not paying royalties on copyrighted broadcasts to give themselves an unfair advantage in bidding against their acknowledged competitors the broadcasting stations for exclusive rights to motion pictures, sporting events, and similar popular attractions. There is no reason why the courts here should ignore the inter-relationship of these and cable television's other origination and commercial activities and thus help subsidize the cable television industry which by its own admission, *supra* at 7, devotes the bulk of its efforts to appropriat-

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[11]At the trial, Mr. Kahn tried to repudiate his characterization of his company as a "broadband communications" business instead of a mere "CATV." He attempted to portray the former phrase as referring only to the distant future. TPT Br. 18. Compare his pretrial remarks:

1970: "In quick succession *have come* these milestones in your company's transition from a cable TV to *a fully-realized broadband communications organization*" (E-43) (emphasis added);

1971: "I suppose I ought to tell you that I *do not* represent a CATV company. Rather, we at Teleprompter Corporation *now* think of ourselves *as a broadband communications company*" (E-115) (emphasis added).

ing, without payment and for its own benefit, copyrighted works of others. After all, the only difference between the competitors is that cable television uses wire and charges its subscribers.

Moreover, with "pay cable" possibly on the horizon, any program that cable television succeeds in siphoning away from broadcast television will no longer be available to the public at large free of charge, but will only be available to those ready and willing to pay the fees demanded by a cable television operator, be they per-system, per-channel, or per-program fees. See *TV Guide*, November 17, 1973, at 7.

All indications point to cable television as the vehicle for the entry of pay television onto the scene. If it succeeds, people who now receive their television programming free—and they constitute the bulk of Americans in every economic stratum—will have to pay for it, if they can.[12] It would be incongruous to permit Teleprompter, while not paying for the broadcast programming which it uses to attract paying subscribers in the first instance, to continue to use the fees collected for the provision of such programming to facilitate the purchase of other programming material which it may then use as a basis for its pay television operations.

II

FCC REGULATION IS IRRELEVANT TO THE ISSUES HEREIN.

As in its brief on the distant signal issue in Docket No. 72-1628, Teleprompter urges that it somehow has a copyright immunity because the FCC has encouraged

[12]Cable television now serves the affluent predominantly, as its penetration into New York City clearly indicates. (Record on Appeal Plaintiff's Ex. 300 (not printed in the Appendix submitted jointly by the parties).) In New York it is the affluent Upper East Side and prosperous Upper West Side—not the "inner city"—which can afford and thus has access to the cable.

program origination, the sale of commercials, and interconnection by cable television stations. As we have noted in our brief in Docket No. 72-1628, however, the FCC has based all of its cable television regulations on the assumption that there would be a judicial or legislative determination that cable should pay for the programming it uses. Cross-Pet. Resp. Br. 39-40, 52-53. Indeed, the FCC issued its 1972 *Cable Television Report and Order*, 36 FCC 2d 143, which included various regulations of cable television origination (*id.* at 195, ¶139), on the express assumption that cable television stations would be liable for copyright for use of *both* local and distant broadcast television signals, as provided for in the Consensus Agreement entered into between cable, copyright, and television interests. *Id.* at 166-168, ¶¶63-67; see Appdx. D at 285. This agreement has now fallen through as a result of a repudiation by the cable industry coincident with its transitory victory in the District Court and its hopes based on this Court's grant of *certiorari* herein. See MPAA Br. 58-60.

Moreover, as discussed at length in our answering brief on the distant signal issue, the FCC has never assumed that its actions would grant copyright immunity to the cable television industry. FCC regulations cannot grant such immunity and the FCC has recognized this fact on many occasions. See, *e.g.*, Cross-Pet. Resp. Br. 50-53. That the FCC has permitted or required cable television stations to render certain services as a communications regulatory matter cannot affect copyright matters. Broadcast television stations are *also* permitted and required by the FCC to render certain services (including local live origination); yet no one has suggested that as a result broadcast stations should be relieved of liability under the Copyright Act and their responsibility to respect private property.

III

"NETWORK" REGULATION IS CABLE TELEVISION'S SELF-CREATED HOBGOBLIN.

Teleprompter improperly tries to paint this case as one of the networks versus the allegedly defenseless cable industry. TPT Br. 30, 35-36; *cf.* TPT Pet. Br. 5, 37-38, 55-56, 66-67, 78. The absurdity of this notion appears when one reviews the names of those large corporations which dominate the cable industry today. MPAA Br. 44-45.

There is no evidence that the networks control a significant number of copyrights or that they would exercise what control they do have in such a way as to dominate the cable television industry. Cross-Pet. Resp. Br. 66-67. Neither CBS nor the other three Cross-Petitioners herein are attempting to prohibit or are desirous of prohibiting cable television origination or the sale of commercials by cable television stations. Cross-Petitioners herein merely ask that cable television stations which to all intents and purposes are the functional equivalents of traditional broadcasters be held liable for copyright in the same manner as traditional broadcasters.

CBS is entitled to have its copyrights protected, just as Teleprompter would claim protection for its copyrighted works. Calvada, Chertok, and Dena, the three other Cross-Petitioners in this docket, as well as the scores of small producers of television programming are not "networks." They too are entitled to be protected against the buccaneering practices of the cable television industry.

In the last analysis copyrighted television programs are the products of creative efforts of writers, actors, musicians, composers, directors, and others. The interests of all of these artists would clearly be adversely affected by the grant of a total exemption from copyright liability to the cable television industry as urged by Teleprompter here. See the briefs *amici* filed in this matter by ASCAP, the Authors League, and the Screen Actors Guild, the Directors Guild and the Writers Guild.

CONCLUSION

If we are to avoid future copyright litigation and, indeed, if we are to have a legislative resolution of the cable-copyright problem, which may take into account political factors as well as legal factors, a prompt, affirmative answer is needed from this Court to the effect that the cable industry is not, as all other users of copyrighted works are not, beyond the reach of the Copyright Act. To establish this principle, the judgment of the Court of Appeals should be reversed insofar as it affirms in part the judgment of the District Court.

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